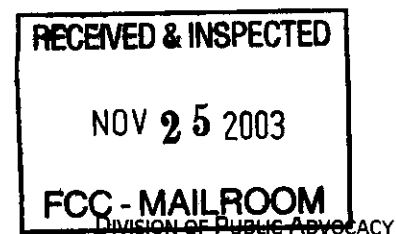


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November 21, 2003

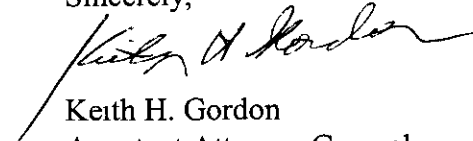
Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street S.W. Suite TW-A325
Washington, D.C. 20554

Re: WC Docket No. 03-211- Vonage Holdings Corp. Petition for Declaratory
Ruling Concerning an Order of the Minnesota Public Utilities Commission

Dear Ms. Dortch:

Pursuant to the Commission's September 26, 2003 Notice of Pleading Cycle (DA No. 03-2952), please find enclosed the Reply Comments of New York State Attorney General Eliot Spitzer

Sincerely,

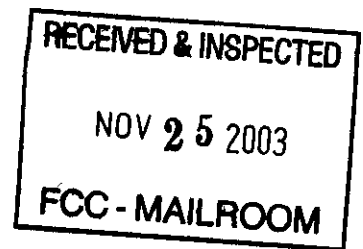

Keith H. Gordon
Assistant Attorney General

cc. Ms. Janice M. Myles, Wireline Competition Bureau, Competition Policy Div. Ste. 5-C327

Qualex International, Portals III, 445 12th Street, S.W.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544



-----X
In the Matter of

VONAGE HOLDINGS CORPORATION

WC Docket No. 03-211

Petition for Declaratory Ruling
Concerning an Order of the
Minnesota Public Utilities Commission

----- X

**REPLY COMMENTS
OF
ELIOT SPITZER
ATTORNEY GENERAL
Of THE
STATE OF NEW YORK**

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November 21, 2003

Contents

Introduction and Summary	1
Argument	3
I. The Commission Should Deny Vonage's Petition	3
A. Commission Intervention in MNPUC's Vonage Proceeding Is Moot	3
B. Such Generic Policies At Issue Should Not Be Decided In This Provider-Specific Matter	3
II. The Commission Should Clarify Vital VoIP Policy Issues Expeditiously	5
A. All Parties Would Benefit From Resolution Of Key VoIP Regulatory Issues	5
B. Important Consumer Protection Issues Are In Limbo And Should Be Addressed In A Notice Of Proposed Rulemaking	6
1. Contribution to public benefit funds	6
2. Provision of standard local telephone service terms and practices	7
C. State and Federal Law Enforcement Needs Must Be Safeguarded	9
Conclusion	10

Before the
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-----X
In the Matter of
VONAGE HOLDINGS CORPORATION
Petition for Declaratory Ruling
Concerning and Order of the
Minnesota Public Utilities Commission
----- X

WC Docket No. 03-211

**REPLY COMMENTS OF ELIOT SPITZER
ATTORNEY GENERAL OF THE STATE OF NEW YORK**

Introduction and Summary

On September 22, 2003, Vonage Holdings Corporation ("Vonage") petitioned¹ the Federal Communications Commission ("FCC" or "Commission") seeking a declaratory ruling preempting and overturning a September 11, 2003 Order of the Minnesota Public Utilities Commission² ("MNPUC") that required Vonage's voice over Internet protocol ("VoIP") service to comply with state telephone carrier regulations, including delivery of E-911 service. Vonage asserts that the FCC's interpretation of the Telecommunications Act of 1996 classifies Vonage's VoIP service as an "information service" which is not subject to state regulation. Vonage further asserts that separation of the interstate and intrastate aspects of its VoIP service is impossible, so

¹ WC Docket No. 03-211 - *Petition for Declaratory Ruling, In the Matter of Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning and Order of the Minnesota Public Utilities Commission*, filed September 22, 2003 ("Vonage Petition").

² MNPUC Docket P-6214/C-03-108, *Order Finding Jurisdiction and Requiring Compliance, In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, issued September 11, 2003.

the FCC should preempt all state regulation of VoIP services.

On September 26, 2003, the Commission invited interested parties to submit initial comments on the Vonage Petition by October 27, 2003, with replies due November 24, 2003.³ Fifty-one parties submitted initial comments, to which the New York State Attorney General (“NYSAG”) submits these reply comments.

The NYSAG is charged with enforcing state and federal consumer protection laws, including prohibitions of antitrust and deceptive business practices. The NYSAG advocates in FCC proceedings on behalf of New York State, consumer and small business interests and the public interest generally.

The FCC should deny Vonage’s Petition on two major grounds. First, since the MNPUC’s Order has been enjoined by the U.S. District Court of Minnesota,⁴ the specific relief Vonage seeks is no longer necessary. Moreover, the myriad regulatory issues raised in the Vonage Petition have far broader consequences that are so important to consumers, VoIP and other carriers, state regulators and law enforcement agencies, that it is not appropriate to resolve those issues as part of one provider’s request for a declaratory ruling. The Commission should instead resolve these issues in the context of the Notice of Proposed Rulemaking (“NPRM”) announced November 6, 2003.⁵

³ FCC Public Notice, *Pleading Cycle Established For Comments On Vonage Petition for Declaratory Ruling*, issued September 26, 2003.

⁴ USDC Dist. of MN, Civil No. 03-5287, *Vonage Holdings Corporation v. Minnesota PUC, et al.*, published October 16, 2003.

⁵ On November 6, 2003, FCC Chairman Michael K. Powell announced that following a public forum on VoIP issues to be held December 1, the Commission will “initiate a Notice of Public Rule Making to inquire about the migration of voice services to IP-based networks and

Argument

I. The Commission Should Deny Vonage's Petition

A. Commission Intervention in MNPUC's Vonage Proceeding Is Moot

The NYSAG agrees with the comments by Unites States Telecom Association (“USTA”),⁶ the Minnesota Department of Commerce (“MNDOC”)⁷ and others⁸ that Vonage's petition has been rendered moot by the Minnesota District Court's injunction.⁹ As the MNPUC order in question was stayed, unless and until the court's ruling is altered, Vonage is not under any obligation to comply with the MNPUC's regulatory requirements.¹⁰ The FCC, therefore, need not address Vonage's request for declaratory relief.

B. Such Generic Policies At Issue Should Not Be Decided In This Provider-Specific Matter

Because the legal, policy and other regulatory issues raised by the Vonage Petition are of such generalized importance and involve questions of major significance impacting consumers, carriers, state and federal law enforcement agencies, local emergency response agencies, state and local taxing authorities and state regulators, it is not appropriate that the Commission resolve

gather public comment on the appropriate regulatory environment for these services.” FCC release, *FCC to Begin Internet Telephone Proceedings*, November 6, 2003.

⁶ USTA initial comments at 3.

⁷ MNDOC initial comments at 3.

⁸ See e.g., SBC initial comments at 1, and U.S. Department of Justice and F.B.I. joint comments (“DOJ-FBI”) at 3-4

⁹ *Vonage Holdings Corporation v. Minnesota PUC, et al., supra.*

¹⁰ See MNPUC Memorandum and Order, *Ibid*

these issues in the context of Vonage's provider-specific petition. The issues raised by Vonage are directly related to three other requests for declaratory rulings pending FCC resolution,¹¹ as well as multiple major generic policy rule makings on the future of the Universal Service Fund ("USF"),¹² interstate access charges¹³ and broadband Internet access regulation.¹⁴ The FCC ought not now decide Vonage's narrow petition, which is neither necessary to resolve Vonage's dispute with the MNPUC nor would not resolve the status of other VoIP providers using varied technology. Instead, the Commission should address these issues in the broader proceeding it has announced concerning VoIP's impact on consumers, market competition, relationships between VoIP and non-VoIP providers, social policies, public safety and government revenues.

¹¹ See Docket No. WC-03-45 - *Petition for Declaratory Ruling that pulver.com's Free World Dialup is neither Telecommunications nor a Telecommunications Service*; Docket No. WC-02-361- *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*; *Petition of U.S. West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (April 5, 1999).

¹² In 1998, the FCC issued tentative assessments of the classification of VoIP for USF purposes, but declined to make definitive rulings because the record was incomplete at that time. *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998) ("USF Report"). To date, these issues have not been resolved. See also CC Docket 96-45 - *Further Notice of Proposed Rulemaking and Report and Order*, FCC 02-43, (Feb. 26, 2002).

¹³ CC Docket No. 01-92, *Notice of Proposed Rulemaking, In the Matter of Developing a Unified Intercarrier Compensation Regime*, FCC 01-132 (April 27, 2001).

¹⁴ CC Docket No. 02-33 *et al.*, *Notice of Proposed Rulemaking, In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC 02-42 (Feb. 15, 2002).

II. The Commission Should Clarify Vital VoIP Policy Issues Expeditiously

A. All Parties Would Benefit From Resolution Of Key VoIP Regulatory Issues

The NYSAG agrees with the legal analyses of multiple parties¹⁵ that the FCC's previous interpretations of the 1996 Telecommunications Act definition of "telecommunications service" clearly applies to Vonage's VoIP service offering. Vonage should not be granted blanket exemption from all regulation as either an enhanced or information service. The legal analyses presented in numerous comments supporting the Vonage Petition¹⁶ demonstrate, however, that there is a serious lack of clarity and legal certainty in how VoIP is treated under the current law and regulations. This regulatory ambiguity merits the Commission's immediate attention, as continued uncertainty serves no affected party's interest.

In the last few years, the issue of VoIP's regulatory status has been raised in numerous states.¹⁷ State regulators would benefit greatly from the FCC's comprehensive determination of

¹⁵ The analysis need not be recited again in this reply comment. *See e.g.*, initial comments filed by New York State Public Service Commission, Verizon, National Exchange Carrier Association, Iowa Utilities Board, Sprint Corporation, MNPUC, Minnesota Attorney General's Office, NASUCA, Ohio Attorney General, California PUC, USTA, MNDOD, DOJ-FBI, Frontier and Citizens Telephone Companies, Association of Public-Safety Communications Officials, Metropolitan 911 Board, Communications Workers of America, Independent Telephone and Telecommunications Alliance, Rural Iowa Telephone Association, Montana Independent Telecommunications Systems, and Washington Enhanced 911 Program.

¹⁶ *See e.g.*, Level 3 Communications, MCI/CompTel, USA DataNet, SBC Communications, Motorola, High Tech Broadband Coalition, Voice of the Net Coalition, and 8x8, Inc.

¹⁷ In addition to the litigated Minnesota proceeding, there are formal regulatory proceedings ongoing in New York, Alabama, Ohio, Pennsylvania, Washington, *See Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corp. Concerning Provision of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, NYSPSC Case 03-C-1285; *Petition for Declaratory Order Regarding Classification of IP Telephony Service*, Alabama PSC Docket 29016; *In the Matter of*

the issues surrounding the regulatory classification of VoIP services. Likewise, VoIP and other providers would be spared the expense of litigating their cases before multiple state jurisdictions if the FCC acts promptly to determine a national policy that would shape the issues that may remain for state regulators to determine.

B. Important Consumer Protection Issues Are In Limbo And Should Be Addressed In A Notice Of Proposed Rulemaking

There are a number of important public policy issues raised by Vonage and other VoIP providers' entry in telephony markets that ought to be addressed in the Commission's forthcoming NPRM. Because parties will have an opportunity to state their views fully once the NPRM is issued, the NYSAG will simply list the questions and issues that should be included in the NPRM.

1. Contribution to public benefit funds.

Should VoIP providers and their subscribers contribute to the Universal Service Fund that assists low income consumers, schools and libraries with obtaining affordable telephone services? If not, will migration of customers from traditional telephone services to VoIP providers either reduce the funds available for USF programs or increase the burden on non-VoIP customers? Should VoIP providers and their subscribers contribute to similar state-operated

Commission Investigation Into Voice Services Using Internet Protocol, Ohio PUC Case 03-950-TP-COI; Investigation of Voice Over Internet Protocol as a Jurisdictional Service, Pennsylvania PUC Docket M-00031707; Staff Investigation re Voice Over Internet Protocol, Washington UTC Docket UT-030694. Informal inquiries are pending before regulators in California, Wisconsin, and Illinois. Court litigation between the Oregon Exchange Carrier Association and LocalDial Corp. was dismissed by the Clackamas County, Oregon Circuit Court. See also NYSPSC Case 01-C-1119 - Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges, Order Requiring Payment of Intrastate Carrier Access Charges, May 31, 2002.

programs, such as New York's Targeted Accessibility Fund (which assists consumers with hearing and other physical disabilities).

Should VoIP subscribers pay state and local emergency 911/E-911 surcharges since they make use of emergency response services?

Should VoIP providers contribute to state funds that support telephone regulatory agencies or pay state and local taxes on intrastate services provided to subscribers? How should jurisdictional allocation of VoIP services be identified and reported?

2. Provision of standard local telephone service terms and features

Although Vonage presents its DigitalSmartSM service as a substitute for traditional local and long distance telephone service,¹⁸ there are a number of significant differences between the service Vonage provides and the service local exchange carriers are required to provide in New York and other states. If VoIP providers are classified as information services or otherwise exempted by the FCC from state regulatory requirements, then their VoIP subscribers may be denied some or all of the following list of customer protections.

Should VoIP providers be required to facilitate communications with consumers having hearing or other physical disabilities that require use of telephone relay or other special services?

Should VoIP providers be required to provide subscribers optional blocking of pay-per-call services¹⁹ and non-telecommunications services to prevent such charges from being incurred?

¹⁸ The Vonage website tells consumers, "You get local, regional, and long distance U.S. and Canadian calling." <http://www.vonage.com/features.php>.

¹⁹ Pay-per-call services include are code 900 and 540, 976, and 970 exchange calls.

Should VoIP providers be required to provide subscribers optional blocking of caller-ID service to restrict access to their telephone numbers as some states' regulations require of other providers?²⁰

How would classification of VoIP as either a telecommunications service or an information service affect VoIP providers' obligation to comply with various state statutory and regulatory consumer protection policies?²¹

Can VoIP providers provide subscribers with E911/911 emergency service that is equivalent to that provided by traditional local exchange carriers? If not, what level of E911/911 emergency service is adequate to protect the health and safety of VoIP subscribers and others²² who may use their telephones in an emergency?

What level of minimum telephone service quality standards should be applied to VoIP

²⁰ Some state regulations require that providers offer only per-call blocking, others, such as New York, require provision of both per-call and all-call blocking, while still other states either require no Caller-ID blocking options, or restrict blocking availability to select customers such as domestic violence shelters.

²¹ *E.g.*, New York requires carriers to participate in the Public Service Commission's customer dispute resolution programs, and to suspend termination of service for nonpayment of amounts in dispute until the matter is resolved. 16 New York Code Rules and Regulations ("NYCRR") § 633.16 and Part 12. Vonage's customer agreement denies subscribers such protections, and instead requires binding commercial arbitration which may cost consumers more than the amount in dispute. Vonage Customer Agreement ¶ 6.1. Vonage's Customer Agreement asserts the provider's right to terminate service at any time if its charges are not paid in full. Vonage Customer Agreement ¶ 4.3. New York also requires carriers to provide consumers a minimum suspension/termination notice period and prevents termination of service to customers with medical emergencies. 16 NYCRR §§ 633.4 - 633.8.

²² For example, a business may subscribe to Vonage or another VoIP provider that does not transmit emergency calls on dedicated trunks to the public safety answering point. The safety needs of customers or employees of such subscribers, who may not be aware of the reduced emergency service access available, would also be affected.

providers given the differing technologies among VoIP providers and their distinctions from traditional switched telephone services?²³

What procedures should VoIP providers be required to follow to facilitate smooth migration of customers between VoIP and non-VoIP providers to ensure that customers do not lose dial tone in the process?²⁴ Furthermore, where a VoIP carrier goes out of business or leaves a particular market, what protections should apply to facilitate transfer of all its subscribers to new providers without service interruption?²⁵

C. State and Federal Law Enforcement Needs Must Be Safeguarded

The implications of Vonage's and other VoIP offerings for federal agencies' law enforcement and national security activities were well presented in the DOJ-FBI joint filing. Carrier compliance with statutory requirements for telecommunications providers to cooperate with lawful governmental investigatory efforts to monitor calls and capture relevant call routing and other data is also critically important to investigations conducted by state and local prosecutors and police. For example, the NYSAG's Organized Crime Task Force has devoted substantial effort and capital to access facilities of numerous local exchange carriers and wireless carriers to effect its investigations of major crimes. State and local law enforcement activities

²³ E.g., the local telephone service standards adopted by the New York State Public Service Commission in 2000 may not be readily applicable to VoIP providers like Vonage. See 16 NYCRR §§ 602 - 603.

²⁴ See e.g., New York PSC Case 00-C-0188 - *Order Adopting Guidelines, Proceeding on Motion of the Commission to Examine the Migration of Customers Between Local Carriers*, issued January 8, 2001; *Order Adopting Phase II Guidelines*, issued June 14, 2002.

²⁵ See e.g., *Id.*, *Order Adopting Revised Mass Migration Guidelines*, issued January 2, 2003.

would be compromised if the FCC does not require Vonage and other VoIP providers to comply with the Communications Assistance for Law Enforcement Act.²⁶

Conclusion

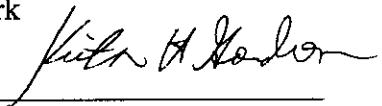
The NYSAG urges the Commission to deny Vonage's request for declaratory relief, and instead promptly commence a rulemaking to expeditiously consider and determine the key issues concerning VoIP services provided by Vonage and other parties. The Commission should specifically address the regulatory classification of VoIP telephony under the 1996 Act, VoIP providers' responsibilities regarding contribution to USF, collection of state taxes and surcharges, E-911 service, CALEA, and consumer protections. The NYSAG will comment more specifically on how these and other issues presented in the NPRM should be resolved once the proceeding is commenced.

Dated: New York, New York
November 21, 2003

Respectfully submitted,

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²⁶ 47 U.S.C. § 1001, *et seq*